A

Sahrul Mazlee bin Mohd Khalid v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — APPEAL (CRIMINAL) NO J-05(M)-633–12 OF 2019
ABDUL KARIM, VAZEER ALAM AND SUPANG LIAN JJCA
4 JANUARY 2022

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused convicted for drug trafficking — Whether accused had knowledge of drugs — Whether trial judge correctly found that appellant was in actual possession of drugs — Whether there was misdirection by trial judge — Whether trial judge conducted maximum evaluation on prosecution's evidence — Whether*
D *trial judge adequately considered defence case — Whether prima facie case established — Whether there was suppression or withholding of evidence by prosecution — Whether there was a break in chain of evidence — Whether discrepancies affected credibility of witness — Whether appellate interference warranted — Whether conviction and sentence safe — Dangerous Drugs Act*
E *1952 s 39B(1)(a) — Criminal Procedure Code s 180(1)*

This was the appellant's appeal against conviction and sentence for two offences under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) of the Act. The prosecution's case was that on
F 19 February 2017, SP8 together with a team of police officers conducted surveillance on a double storey terrace house in Johor Bahru. After about 30 minutes, SP8 saw the appellant exiting the front door of the house and walking towards the gate. SP8 noticed that the appellant was carrying a white plastic bag in his left hand. SP8 caught hold of the appellant's left hand and took the
G white plastic bag with the words 'KIO-DA' (P38) written on it. SP8 checked the contents of the plastic bag and found one slab of compressed dried plant material suspected to be cannabis, wrapped with transparent plastic. The appellant was seen to be shocked, ie 'terkejut' in the words of SP8. SP8 and his raiding team then brought the appellant inside the house. The police team then
H conducted a search of the house, and in an unlocked bedroom on the upper floor they found, amongst others, two large black plastic packages on the floor near the wall. SP8 examined the contents of the first plastic package (P63) and found one gunny sack with the words '40kg' on it containing 31 compressed slabs of dried plant material wrapped with transparent plastic suspected to be
I cannabis. Similarly, in the second plastic package (P64), SP8 found one gunny sack with the words '40kg' on it containing 40 slabs of compressed dried plant material suspected to be cannabis wrapped with transparent plastic. The appellant was arrested, and all the incriminating items were seized by SP8. The slab of compressed dried plant material seized from the appellant in the white

plastic bag was analysed by the chemist (SP9) to be cannabis with a net weight of 1,003g, whilst the compressed slabs of dried plant material seized from the bedroom in the house were analysed by SP9 to be cannabis weighing 71,398g net. The appellant was then charged with two offences under s 39B(1)(a) of the the Act punishable under s 39B(2) of the Act. The learned trial judge found that the prosecution had established a prima facie case for both charges and called upon the appellant to enter defence. The appellant chose to testify under oath. At the close of the defence case, the High Court judge found the appellant guilty on both charges, convicted him and imposed the mandatory death sentence. The appellant being dissatisfied, appealed against both conviction and sentence on the grounds that the learned trial judge: (a) misdirected himself when he failed to conduct a maximum evaluation on all the prosecution's evidence; and (b) erred when he failed to appreciate the defence case.

Held, dismissing the appeal:

(1) The trial judge had conducted a maximum evaluation of the evidence at the close of the prosecution's case in accordance with the requirements of s 180(1) of the Criminal Procedure Code ('the CPC') to ascertain if the prosecution had discharged its burden to establish a prima facie case in respect of both amended charges. The learned trial judge quite correctly held that in order for the prosecution to make out a prima facie case in respect of a charge under s 39B(1)(a) of the Act, it was incumbent upon the prosecution to prove the following ingredients of the offence: (a) firstly, that the drugs were dangerous drugs within the meaning and definition provided in the Act; (b) secondly, that the accused was in possession of the said drugs; and (c) thirdly, that the accused was trafficking in the drugs (see paras 38–39).

(2) The court was satisfied that the movement of the exhibits from the time the exhibits were recovered until the time the exhibits were produced in court, were done without any fatal break in the chain of evidence. Thus, the drugs produced in court were the same drugs seized by the police during the raid. The appearance of being shocked at the time of arrest was by itself not necessarily the strongest strand of evidence against the appellant to infer knowledge. Nevertheless, the evidence of the appellant actually holding the white plastic bag (P38) containing the slab of cannabis and walking towards the house gate to get to his motorcycle parked outside, was indicative of knowledge of the drugs in the bag. More so when more similar slabs of cannabis were later found in the bedroom upstairs together with his belongings. These evidence, when taken together with the appellant's reaction of being shocked upon arrest, led to the irresistible inference that in the circumstances the appellant knew about the incriminating items found inside the white plastic bag (P38) and later in the bedroom. The finding of the trial judge at the close of the

prosecution that the appellant was in actual, as opposed to presumed, possession of the drugs was well supported by evidence, and the inference drawn was wholly in accord with the facts and circumstances of the case. There was no misdirection by the trial judge when he concluded that the element of possession, both physical and mental, had been established by the prosecution (see paras 44, 57–58, 60 & 67).

(3) There was no substantial or compelling reason to disagree with the trial judge's finding that SP8 was a credible witness and that the testimony of SP8 was clear and convincing. There was no evidence to impute any motive on SP8 to lie in court and implicate the appellant. The absence of the other police officers of the raiding party did not create any gap in the prosecution's case. In the circumstance, no adverse inference should be drawn against the prosecution as there was no suppression or withholding of evidence. Having gone through the evidence, the court came to the same conclusion as the learned trial judge that the discrepancies did not materially affect the prosecution case nor SP8's credibility as a witness. It would be quite improper for the court to rule that SP8 was not a reliable witness, purely on the basis that his evidence contained a number of contradictions, without having the advantage of seeing his demeanour while giving evidence. Thus, the learned justices found no compelling reasons that required appellate interference (see paras 77 & 80).

(4) The trial judge had considered all aspects of the defence and weighed the evidence adduced by the defence in totality with the evidence of the prosecution. The trial judge had given due consideration to the appellant's version in relation to the first amended charge, and in particular the evidence of DW2 had been assessed and considered at length. The outcome of that evaluation and findings made may not be in accord with the expectation of the appellant, but that did not mean that the defence contention had not been properly assessed by the trial judge. There was sufficient judicial appreciation of the evidence by the trial judge. Therefore, there was no reason to interfere with these findings of fact. As for the second amended charge, once again the learned trial judge had done a detailed assessment of the evidence adduced by the defence. The trial judge correctly concluded that Abang Man and his wife were an invention of the accused, and that no one except the appellant was occupying the bedroom in which the two large black packages containing the drugs were found. Besides the enormous quantity of drugs, there were also an electronic scale, metal ruler, cutter and a roll of transparent plastic wrapper found in the bedroom. The presence of these implements were indicative of the fact that the drugs were meant to be weighed, measured and packed, with the obvious intention of trafficking (see paras 90–92 & 95).

[Bahasa Malaysia summary

Ini adalah rayuan perayu terhadap sabitan dan hukuman bagi dua kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') yang boleh dihukum di bawah s 39B(2) Akta tersebut. Kes pendakwaan adalah pada 19 Februari 2017, SP8 bersama sepasukan anggota polis menjalankan intipan di sebuah rumah teres dua tingkat di Johor Bahru. Selepas kira-kira 30 minit, SP8 melihat perayu keluar dari pintu hadapan rumah dan berjalan menuju ke pintu pagar. SP8 mendapati perayu membawa beg plastik putih di tangan kirinya. SP8 mencapai tangan kiri perayu dan mengambil beg plastik putih yang tertera perkataan 'KIO-DA' (P38) di atasnya. SP8 memeriksa kandungan beg plastik tersebut dan menemui satu kepingan bahan tumbuhan kering mampat yang disyaki ganja, dibalut dengan plastik lutsinar. Perayu dilihat terkejut seperti yang dinyatakan SP8. SP8 dan pasukan serbuannya kemudian membawa perayu masuk ke dalam rumah. Pasukan polis kemudian menjalankan pemeriksaan di rumah tersebut, dan dalam bilik tidur yang tidak berkunci di tingkat atas mereka menemui, antara lain, dua bungkusan plastik hitam besar di atas lantai berhampiran dinding. SP8 memeriksa kandungan bungkusan plastik pertama (P63) dan menjumpai satu kantung guni tertera perkataan '40kg' mengandungi 31 kepingan mampat bahan tumbuhan kering yang dibalut dengan plastik lutsinar disyaki ganja. Begitu juga dalam bungkusan plastik kedua (P64), SP8 menjumpai satu kantung guni tertera perkataan '40kg' mengandungi 40 ketul bahan tanaman kering mampat disyaki ganja yang dibalut dengan plastik lutsinar. Perayu telah ditangkap, dan kesemua barang yang disyaki telah dirampas oleh SP8. Kepingan bahan tumbuhan kering mampat yang dirampas daripada perayu di dalam beg plastik putih telah dianalisis oleh ahli kimia (SP9) sebagai ganja dengan berat bersih 1,003g, manakala kepingan mampat bahan tumbuhan kering dirampas dari bilik tidur di rumah tersebut telah dianalisis oleh SP9 sebagai ganja seberat 71,398g net. Perayu kemudiannya didakwa atas dua kesalahan di bawah s 39B(1)(a) Akta tersebut yang boleh dihukum di bawah s 39B(2) Akta yang sama. Hakim perbicaraan yang bijaksana telah mendapati bahawa pihak pendakwaan telah membuktikan kes prima facie bagi kedua-dua pertuduhan dan meminta perayu membela diri. Perayu memilih untuk memberi keterangan secara bersumpah. Di akhir kes pembelaan, hakim Mahkamah Tinggi mendapati perayu bersalah atas kedua-dua pertuduhan, mensabitkannya dan menjatuhkan hukuman mati mandatori. Perayu tidak berpuas hati, merayu terhadap kedua-dua sabitan dan hukuman atas alasan bahawa hakim perbicaraan yang bijaksana: (a) salah arah apabila beliau gagal menjalankan penilaian maksimum ke atas semua keterangan pihak pendakwaan; dan (b) terkhilaf apabila beliau gagal mengambil kira kes pembelaan.

Diputuskan, menolak rayuan:

(1) Hakim bicara telah menjalankan penilaian maksimum terhadap

keterangan di akhir kes pendakwaan mengikut keperluan s 180(1) Kanun Tatacara Jenayah ('KTJ') untuk memastikan sama ada pihak pendakwaan telah melepaskannya. beban untuk membuktikan kes prima facie berkenaan dengan kedua-dua pertuduhan yang dipinda. Hakim perbicaraan yang bijaksana dengan tepat berpendapat bahawa bagi pihak pendakwaan membuktikan kes prima facie berkenaan dengan pertuduhan di bawah s 39B(1)(a) Akta tersebut, ianya adalah menjadi tanggungjawab pihak pendakwaan untuk membuktikan ramuan kesalahan berikut: (a) pertama, bahawa dadah tersebut adalah dadah berbahaya dalam pengertian dan takrifan yang diperuntukkan dalam Akta; (b) kedua, bahawa tertuduh memiliki dadah tersebut; dan (c) ketiga, bahawa tertuduh mengedar dadah (lihat perenggan 38–39).

(2) Mahkamah berpuas hati bahawa pergerakan ekshibit dari masa ekshibit tersebut ditemui sehingga masa ekshibit dikemukakan di mahkamah, telah dilakukan tanpa sebarang pemecahan teruk dalam rantaian keterangan. Justeru, dadah yang dikemukakan di mahkamah adalah dadah yang sama dirampas polis semasa serbuan. Reaksi terkejut pada masa tangkapan tersebut dengan sendirinya tidak semestinya keterangan terkuat terhadap perayu untuk membuat kesimpulan pengetahuan. Namun begitu, keterangan perayu benar-benar memegang beg plastik putih (P38) mengandungi kepingan ganja dan berjalan ke arah pintu pagar rumah untuk ke motosikalnya yang diletakkan di luar, menunjukkan pengetahuan tentang dadah di dalam beg tersebut. Lebih-lebih lagi apabila lebih banyak kepingan ganja yang serupa ditemui di dalam bilik tidur di tingkat atas bersama-sama barang-barangnya. Keterangan ini, apabila diambil bersama-sama dengan reaksi perayu yang terkejut apabila ditangkap, membawa kepada kesimpulan yang tidak dapat disangkal bahawa dalam keadaan tersebut perayu mengetahui tentang barang-barang yang disyaki yang terdapat di dalam beg plastik putih (P38) dan kemudiannya di dalam bilik tidur. Dapatan hakim perbicaraan pada akhir kes pendakwaan bahawa perayu adalah sebenarnya, berbanding dengan anggapan, pemilikan dadah tersebut disokong dengan baik oleh keterangan, dan kesimpulan yang dibuat adalah sepenuhnya mengikut fakta dan keadaan kes. Tiada salah arah oleh hakim bicara apabila beliau membuat kesimpulan bahawa unsur pemilikan, baik fizikal dan mental, telah dibuktikan oleh pihak pendakwaan (lihat perenggan 44, 57–58, 60 & 67).

(3) Tiada alasan yang substansial atau kukuh untuk tidak bersetuju dengan dapatan hakim bicara bahawa SP8 adalah saksi yang boleh dipercayai dan keterangan SP8 adalah jelas dan meyakinkan. Tiada keterangan untuk mengaitkan sebarang motif SP8 untuk berbohong di mahkamah dan mengaitkan perayu. Ketiadaan pegawai polis lain dari pasukan serbuan tidak mewujudkan sebarang jurang dalam kes pendakwaan. Dalam keadaan itu, tiada inferens buruk harus dibuat terhadap pihak

pendakwaan kerana tiada penyembunyian atau penahanan bukti. Setelah meneliti keterangan, mahkamah membuat kesimpulan yang sama seperti hakim bicara yang bijaksana bahawa percanggahan tersebut tidak menjejaskan kes pendakwaan dan kredibiliti SP8 sebagai saksi. Ia adalah agak tidak wajar mahkamah untuk memutuskan bahawa SP8 bukan saksi yang boleh dipercayai, semata-mata berdasarkan keterangannya mengandungi beberapa percanggahan, tanpa mengambilkira kelebihan melihat tindak tanduknya semasa memberi keterangan. Oleh itu, hakim yang bijaksana tidak menemui alasan kukuh yang memerlukan campur tangan rayuan (lihat perenggan 77 & 80).

(4) Hakim bicara telah mempertimbangkan semua aspek pembelaan dan menimbang keterangan yang dikemukakan oleh pembelaan secara keseluruhan dengan keterangan pihak pendakwaan. Hakim bicara telah memberikan pertimbangan yang sewajarnya kepada versi perayu berhubung dengan pertuduhan pertama yang dipinda, dan khususnya keterangan DW2 telah dinilai dan dipertimbangkan dengan panjang lebar. Hasil daripada penilaian dan dapatan yang dibuat itu mungkin tidak selaras dengan jangkaan perayu, tetapi itu tidak bermakna penghujahan pembelaan tidak dinilai dengan betul oleh hakim bicara. Terdapat penghayatan kehakiman yang mencukupi terhadap keterangan oleh hakim bicara. Oleh itu, tidak ada sebab untuk mengganggu dapatan fakta ini. Bagi pertuduhan pindaan kedua, sekali lagi hakim bicara yang bijaksana telah membuat penilaian terperinci terhadap keterangan yang dikemukakan oleh pihak pembelaan. Hakim bicara dengan tepat membuat kesimpulan bahawa Abang Man dan isterinya adalah ciptaan tertuduh, dan tiada sesiapa kecuali perayu yang mendiami bilik tidur di mana dua bungkusan besar berwarna hitam yang mengandungi dadah tersebut ditemui. Selain kuantiti dadah yang banyak, terdapat juga penimbang elektronik, pembaris logam, pemotong dan segulung pembungkus plastik lutsinar ditemui di dalam bilik tidur. Kehadiran alat ini menunjukkan fakta bahawa dadah tersebut akan ditimbang, diukur dan dibungkus, dengan niat yang jelas untuk mengedar (lihat perenggan 90–92 & 95).]

Cases referred to

Amri bin Ibrahim & Anor v PP and another appeal [2017] 1 MLJ 1; [2017] 1 CLJ 617, FC (refd)

Andy bin Bagindah v PP [2000] 3 MLJ 644; [2000] 3 CLJ 289, CA (refd)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)

Christopher Uchenna Efogwo v PP [2017] MLJU 1215; [2017] 1 LNS 1479, CA (refd)

Dato' Seri Anwar bin Ibrahim v PP and another appeal [2004] 3 MLJ 405; [2004] 3 CLJ 737, FC (refd)

Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293, FC (refd)
Ghasem Hozouri Hassan v PP [2019] 6 MLJ 231; [2018] 6 CLJ 133, FC (refd)
Izwanuddin bin Kasim v Pendakwa Raya [2020] MLJU 1807; [2020] 1 LNS 1568, CA (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (refd)
Mahinder Singh v PP [1967] 1 MLJ 126; [1966] 1 LNS 95, FC (refd)
Md Zainudin bin Raujan v PP [2013] 3 MLJ 773; [2013] 4 CLJ 21, FC (refd)
Mirza Murtala v PP [2010] 5 MLJ 616; [2010] 4 CLJ 150, CA (refd)
Mogan Raj a/l Ravi & Anor v PP and another appeal [2020] MLJU 48; [2020] 3 CLJ 240, CA (refd)
Munusamy Vengadasalam v PP [1987] CLJ Rep 221, SC (refd)
Ng Chai Kem lwn Pendakwa Raya [1994] 2 MLJ 210; [1994] 2 CLJ 593, SC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585; [1987] 1 LNS 72 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1; [1999] 2 AMR 2017, HC (refd)
PP v Lam San [1991] 3 MLJ 426; [1991] 1 CLJ Rep 391, SC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 6 AMR 203; [2006] 1 CLJ 457, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89; [1968] 1 LNS 116, PC (refd)
Prasit Punyang v PP [2014] 4 MLJ 282, CA (refd)
Saad Ibrahim v PP [1968] 1 MLJ 158 (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC (refd)
Simon Savarimuthu a/l Thevarajah v PP [2020] 2 MLJ 495; [2019] 1 LNS 987, CA (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)

Legislation referred to

Criminal Procedure Code ss 180(1), (4), 182A, 182A(1)
Dangerous Drugs Act 1952 ss 2, 37(d), (da), (da)(vi), 39B(1)(a), (2), (2A), (2A)(d)
Evidence Act 1950 ss 8, 134

Appeal from: Criminal Trial No JA-45A-33–07 of 2017 (High Court, Johor Bahru)

Sukhaimi bin Mashud (Teh Poh Teik & Co) for the appellant.
Ku Hayati bt Ku Haron (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Vazeer Alam JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged with two offences under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) of the Act.

[2] The High Court convicted the appellant on both counts and sentenced him to mandatory death.

[3] The appellant being dissatisfied with the judgment of the High Court appealed against both conviction and sentence.

[4] We heard and dismissed the appeal for the following reasons.

THE CHARGE

[5] The appellant was charged with two separate offences under s 39B(1)(a) of the Act. The charges read as follows:

> First Amended Charge:
>
> Bahawa kamu pada 19 Februari 2017 jam lebih kurang 11.00 malam, di alamat No 23, Lorong 5, Jalan 9/16, Taman Air Biru, dalam daerah Johor Bahru, dalam Negeri Johor Darul Takzim telah didapati mengedar dadah berbahaya jenis Cannabis berat bersih 1003 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.
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> Second Amended Charge:
>
> Bahawa kamu pada 19 Februari 2017 jam lebih kurang 11.00 malam, di alamat No 23, Lorong 5, Jalan 9/16, Taman Air Biru, dalam daerah Johor Bahru, dalam Negeri Johor Darul Takzim telah didapati mengedar dadah berbahaya jenis Cannabis berat bersih 71398 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

AT THE HIGH COURT

The prosecution case

[6] The prosecution's case is that on 19 February 2017, acting on information received, DSP Hairy bin Ramlan (SP8) together with a team of police officers from the Jabatan Siasatan Jenayah Narkotik, IPD Seri Alam, Johor Bahru, conducted surveillance on a double storey terrace house at No 23, Lorong 5, Jalan 9/16, Taman Air Biru, Johor Bahru.

A [7] After about 30 minutes of surveillance from a distance of about 10 meters, SP8 saw a male Malay, later identified as the appellant, exiting the front door of the house and walking towards the gate. SP8 noticed that the appellant was carrying a white plastic bag in his left hand. SP8 approached the appellant, identified himself as a police officer and displayed his police authority card.

B

[8] SP8 caught hold of the appellant's left hand and took the white plastic bag with the words 'KIO-DA' (P38) written on it. SP8 checked the contents of the plastic bag and found one slab of compressed dried plant material suspected to be cannabis, wrapped with transparent plastic. The appellant was seen to be C shocked, ie 'terkejut' in the words of SP8. A physical examination of the appellant did not reveal anything incriminating.

[9] SP8 and his raiding team then brought the appellant inside the house. They saw a Malay lady, who was the appellant's wife (SP5) together with two of D their daughters in the living room. A physical examination of SP5 and the two daughters did not reveal anything incriminating.

[10] The police team then conducted a search of the house, and in an E unlocked bedroom on the upper floor they found two large black plastic packages on the floor near the wall. SP8 examined the contents of the first plastic package (P63) and found one gunny sack with the words '40kg' on it containing 31 compressed slabs of dried plant material wrapped with transparent plastic suspected to be cannabis.

F

[11] Similarly, in the second plastic package (P64), SP8 found one gunny sack with the words '40kg' on it containing 40 slabs of compressed dried plant material suspected to be cannabis wrapped with transparent plastic.

G [12] Inside that room the police team also found an electronic weighing scale, a metal ruler, a knife, a roll of transparent plastic wrapping, the appellant's passport, a copy of an ETIKA Takaful insurance document in the name of the appellant, a key, an electricity bill and several other personal items of the appellant, including a shirt and pair of jeans.

H

[13] The appellant was arrested and all the incriminating items were seized by SP8. Search list for the seized items were prepared by SP8, and signed by the appellant and SP8 (P56, P57 and P58). The appellant and the exhibits were brought to IPD Seri Alam at around 2am on 20 February 2017 for further I investigation. After completing some documentation, and marking the seized exhibits, SP8 lodged a police report.

[14] The appellant together with the exhibits were then handed over to the investigations officer Inspector Syed Safizat bin Syed Abdullah (SP10). The

compressed slabs of plant material were later handed over to the chemist (SP9) for analysis. The slab of compressed dried plant material seized from the appellant in the white plastic bag was analysed by the chemist SP9 to be cannabis with a net weight of 1,003g, whilst the compressed slabs of dried plant material seized from the bedroom in the house were analysed by SP9 to be cannabis weighing 71,398g net. These then formed the subject matter of the two amended charges.

[15] The learned trial judge found that the prosecution had established a prima facie case for both charges and called upon the appellant to enter defence. The appellant chose to testify under oath.

The appellant's defence

[16] The appellant's defence in respect of the first amended charge was that he was not holding the 'KIO-DA' white plastic bag (P38) with the drugs. As opposed to the prosecution's version, the defence version, which was put to SP8, was that the white plastic bag (P38) was instead found on the roof of the Viva car belonging to the appellant's wife, that was parked within the house compound. However, SP8 denied this suggestion and stood firm with his evidence that the appellant was holding the white plastic bag (P38) in his left hand at the material time.

[17] The appellant said that what happened prior to the arrest was witnessed by his brother-in-law (SD2) who lived in the house across the street. SD2 said that he did not see the appellant carrying anything whilst exiting from the house. SD2 said that he saw a white plastic bag (P38) on the roof of the Viva car, which was recovered by the police after the appellant was apprehended.

[18] In respect of the second amended charge, the appellant's contention was that the two large black plastic bags (P63 and P64) found in the bedroom upstairs were left behind by one Azman or Abang Long and his wife, who had visited and stayed in the house until a day earlier on 18 February 2017. The appellant denied that the two large black plastic packages (P63 and P64) were his, and said that he had no knowledge of their contents.

Decision at the close of defence case

[19] At the close of the defence case, the learned trial judge found the appellant guilty on both charges, convicted him and imposed the mandatory death sentence.

A THE APPEAL

[20] There were two main broad grounds of appeal canvassed before us, and they are, that the learned trial judge:

B (a) misdirected himself when he failed to conduct a maximum evaluation on all the prosecution's evidence; and

(b) erred when he failed to appreciate the defence case.

C *The appellant's counsel's submission*

[21] In respect of the first ground, learned counsel for the appellant submitted that the prosecution called only one of the raiding officers, ie SP8, to give evidence at trial. Counsel also submitted that since SP8 was the main D prosecution witness, and the only witness who related the events leading to the raid on the house, the seizure of the drugs and the arrest of the appellant, SP8's evidence must be exceptionally convincing. Learned counsel further submitted that if the learned trial judge had undertaken a maximum evaluation of the prosecution evidence at the close of the prosecution's case, he would have found E that the veracity of SP8's testimony was doubtful and that he was not creditworthy.

[22] In particular learned counsel for the appellant contended that there were:

F (a) inconsistencies relating to SP8's evidence on the surveillance and arrest; and

(b) inconsistencies relating to where the appellant was first brought to in the house and as regards the number of persons in the hall of the house.

G First alleged inconsistency

[23] In respect of the first of the two inconsistencies, learned counsel submitted that in the prosecution's opening speech it was stated that SP8 H arrived at the vicinity of the house at 11pm. However, during examination in chief, SP8 said that he and his team arrived at the vicinity of the house at 10.30pm, and conducted surveillance on the house, and that after half an hour he saw the appellant coming out of the house carrying a plastic bag. He approached the appellant, introduced himself and checked the plastic bag and I arrested him. However, in cross-examination SP8 said that he and his team arrived at the vicinity of the house at 11pm.

[24] Counsel further added that if the learned trial judge had conducted a maximum evaluation of the prosecution's evidence, it would be apparent that

SP8 was contradicted by another witness, namely SP4, the appellant's neighbour, who confirmed that at about 11.00pm on that day when she was in her porch drying clothes, she saw three persons arriving in a car, alighting and then apprehending the appellant.

[25] Counsel argued that this discrepancy on the time of arrival of SP8 and his team at the house is important as it relates to the truth of whether SP8 actually conducted surveillance, and saw the appellant carrying the white plastic bag (P38) in his hand.

Second alleged inconsistency

[26] SP8 said during examination-in-chief that the appellant was brought to the house and taken straight to the upstairs room contrary to the evidence of the appellant's wife (SP5) that the appellant was first brought to the kitchen before being taken to the room upstairs. SP8 also gave evidence that there were two adult female and one girl in the hall when they went into the house. Learned counsel for the appellant submitted that this is contrary to SP5's testimony that her elder daughter was in her room.

[27] Learned counsel for the appellant contended that these inconsistencies or discrepancies in the evidence between SP8 and the other two prosecution witnesses go towards SP8's credibility. Learned counsel argued that these discrepancies could have been explained away by the prosecution calling to the witness stand the other members of the police raiding team, which was not done. In this regard counsel submitted that had the learned trial judge adhered to his duty to conduct a maximum evaluation of the evidence, it would be apparent that SP8's evidence is not credible enough to establish a prima facie case.

The evidence of appellant's conduct/reaction upon arrest

[28] Learned counsel for the appellant also submitted that the learned trial judge mishandled the evidence in relation to the appellant's reaction of being shocked or 'terkejut' when he was told that the white plastic bag (P38) contained substance that was believed to be drugs. Learned counsel argued that the appellant did not put up any struggle or attempt to flee, and as such the appellant's conduct is very much consistent with his innocence and could not be used to infer knowledge.

[29] Thus, learned counsel for the appellant submitted, these inconsistencies and infirmities in the prosecution case mean that the prosecution had failed to establish sufficient credible evidence to satisfy the requirements under s 180(4) of the Criminal Procedure Code ('the CPC') to establish a prima facie case of

trafficking in dangerous drugs under s 39B(1)(a) of the Act.

The contention of non-appreciation of defence

[30] The essence of the appellant's defence was that the packages containing the drugs were not his. The appellant contended that the 'KIO-DA' plastic bag (P38) with the drugs was found on the roof of the Viva car parked outside the house, and that he was not carrying the bag as testified by SP8. As for the drugs found in the two large black plastic packages in the bedroom upstairs, the appellant said that they were not his and that they were possibly left behind by Abang Man and his wife who were in the house a day earlier. The appellant said that his version of events is corroborated by the testimony of his brother-in-law (SD2) who said that he was standing outside his house, which is opposite that of the appellant, at the time when the police team apprehended the appellant. SD2 said that he did not see the appellant carrying any plastic bag and instead the bag was recovered by the police from the roof top of the Viva car after the appellant had been apprehended.

[31] Learned counsel for the appellant argued that the following evidence in support of the defence version were not given proper consideration by the learned trial judge:

(a) that Abang Man stayed in the house for two days prior to the appellant's arrest;

(b) that Abang Man came with his wife, one Yati, in a black car;

(c) that Abang Man left the house the afternoon before the appellant's arrest;

(d) that the appellant's wife (SP5) stayed in her boutique during Abang Man's stay in the house;

(e) that the appellant was shocked upon discovery of the drugs;

(f) that the lighting in front of the house was bright;

(g) that SD2 lived in the house at No 18, Lorong 5, Jalan 9/16, Taman Air Biru, Pasir Gudang, Johor Baru, which was opposite the appellant's;

(h) that SD2 was seated in front of his house when the police team arrested the appellant;

(i) that at the material time SD2 was smoking a cigarette and looking at the appellant's house;

(j) that at the material time the outside of the house was well lit by the porch light and a nearby street lamp;

(k) that the distance between SD2's house and the accused's house was approximately 16 feet;

(l) that three persons came out of a car and rushed towards the appellant; and

(m) that the appellant had earlier seen a few items including plastic packages on top of the Viva car parked in the house porch.

[32] Learned counsel for the appellant contended that SD2's evidence corroborated the appellant's version as to what transpired outside the house prior to and during the arrest. And that likewise, SP5's testimony supported the appellant's version as regards Abang Man's stay in the house before the arrest. Hence, learned counsel for the appellant submitted that these aspects of the defence evidence were not adequately considered by the learned trial judge at the close of the defence case, and that this amounts to a misdirection by reason of failure to judicially appreciate the evidence. Learned counsel for the appellant further submitted that had the learned trial judge properly evaluated the entire evidence he would have arrived at a different conclusion, and found that there was reasonable doubt in the prosecution's case.

The respondent's submission

[33] The learned deputy public prosecutor appearing for the respondent submitted that the inconsistencies or discrepancies in evidence alluded to by the learned counsel for the appellant were considered by the learned trial judge before dismissing them as immaterial, and that these discrepancies do not throw doubt on the veracity of SP8's testimony, nor do they raise any reasonable doubt.

[34] As for the appellant's reaction of being shocked when told of the drugs in the bag when first arrested, learned deputy submitted that it can be taken into account under s 8 of the Evidence Act to infer knowledge, as was done by the learned trial judge, and that there was no misdirection.

[35] Hence, the learned deputy submitted that the learned trial judge had conducted a maximum evaluation of the prosecution evidence when making the finding that a prima facie case had been established by the prosecution.

[36] As for the complaint that the learned trial judge had not given due regard to the evidence of the defence and that there was non-appreciation of the defence as a whole, the learned deputy argues that all these evidence were given proper consideration by the learned trial judge at the close of the defence case.

A The learned trial judge having evaluated the entirety of the evidence had found that the prosecution had proved their case on both amended charges beyond reasonable doubt.

THIS COURT'S EVALUATION OF THE ARGUMENTS

B

Duty of the court at the end of prosecution case

[37] The duty of the trial judge at the close of prosecution is well established, and that is the trial judge must undertake a maximum evaluation of the C evidence to determine whether a prima facie case is made out as required under s 180(1) of the CPC. Section 180(1) of the CPC makes it clear that the standard of proof on the prosecution at the close of its case is to make out a prima facie case, while s 182A(1) of the CPC provides that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether D the prosecution has proved its case beyond reasonable doubt.

High Court's finding at close of prosecution case

E **[38]** We note that the learned trial judge had conducted a maximum evaluation of the evidence at the close of the prosecution case in accordance to the requirements of s 180(1) of the CPC to ascertain if the prosecution had discharged its burden to establish a prima facie case in respect of both amended charges. In doing so, the learned trial judge had referred to the principles laid F down in the following high authorities: *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 AMR 2017, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89, *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203; [2006] 1 CLJ G 457.

[39] The learned trial judge quite correctly held that in order for the prosecution to make out a prima facie case in respect of a charge under H s 39B(1)(a) of the Act, it is incumbent upon the prosecution to prove the following ingredients of the offence:

(a) firstly, that the drugs were dangerous drugs within the meaning and definition provided in the Act;

I (b) secondly, that the accused was in possession of the said drugs; and

(c) thirdly, that the accused was trafficking in the drugs.

The first ingredient — Drugs are cannabis

[40] The chemist (SP9) testified that her analysis of the compressed dried plant material that she received on 1 March 2017 showed the substance to be cannabis weighing 1,003g and 71,398g net respectively. SP9 also confirmed that cannabis is a dangerous drug as defined in s 2 of the Act. Apart from her oral testimony, these findings were also set out in the chemist report (P74) prepared by SP9.

[41] The learned trial judge then alluded to the pronouncement in *Public Prosecutor v Lam San* [1991] 3 MLJ 426; [1991] 1 CLJ Rep 391, *Munusamy Vengadasalam v Public Prosecutor* [1987] CLJ Rep 221, and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85, to the effect that the court was entitled to accept the testimony of the chemist at face value without the necessity of him going into the details of analysis, unless it is inherently incredible.

[42] Despite the attempt by the defence to challenge SP9's findings, the learned trial judge did not find anything in the evidence of SP9 for him to conclude that her testimony was inherently incredible. Thus, based on the testimony of SP9 and the chemist report (P74), the learned trial judge found that the prosecution had successfully established the first ingredient, that is, the nature and weight of the drugs forming the subject of the two amended charges.

[43] On the issue of the chain of handling of the drugs, the learned trial judge did not find any break in the chain of evidence of the exhibits from the time of their seizure until their production in court. He was satisfied that the exhibits seized during the raid at the house and eventually produced and tendered in court were the very same items.

[44] In respect of the chain of custody of exhibits, this court had in *Christopher Uchenna Efogwo v Public Prosecutor* [2017] MLJU 1215; [2017] 1 LNS 1479 observed:

> [24] In our view, in a drug trafficking case, the prosecution must, as far as is practically possible, establish the chain of custody as follows:
>
> (a) the seizure and marking of the dangerous drug recovered from the accused by the arresting officer;
>
> (b) the handover of the dangerous drug from the arresting officer to the investigating officer;
>
> (c) the handover by the investigating officer of the dangerous drug to the chemist for chemical analysis; and

(d) the production of the said dangerous drug seized in court as exhibits. In our view, these links in the chain of custody were adequately established by the testimonies of the prosecution witnesses and the documentary records of the case.

Now, having considered the evidence, we are satisfied that the movement of the exhibits from the time the exhibits were recovered until the time the exhibits were produced in court, were done without any fatal break in the chain of evidence. Thus, we agree with the learned trial judge that the drugs produced in court were the same drugs seized by the police during the raid.

Second ingredient — Possession of drugs

[45] Possession can be either actual or presumed. The prosecution can establish the fact of possession by either adducing direct evidence of it, or it can be statutorily presumed by invoking s 37(d) of the Act, when the prosecution establishes custody and control by the accused of the item containing the drugs. Section 37(d) of the Act, which reads:

> In all proceedings under this Act or any regulation made thereunder —
>
> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

[46] When possession is sought to be established independent of the statutory presumption in s 37(d) of the Act, ie actual possession, the prosecution must prove that the accused is so situated with respect to a thing he is said to be in possession to the extent that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such, that he may be presumed to intend to do so in case of need. There must be present both the physical and mental element before actual possession is established in law. See: *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237.

[47] In *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158 Yong J was quite emphatic as to the requirement of the element of knowledge on the part of the possessor before he could be criminally incriminated with possession of a prohibited article, and he noted:

> In my opinion mere possession is one thing and possession with mens rea is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of mens rea. Without mens rea possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

Hence, when the prosecution seeks to establish actual possession, it must prove both the actus reus and the mens rea elements for there to be possession in law. See also: *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585; [1987] 1 LNS 72.

[48] This principle was well explained by the Federal Court in *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 CLJ 149, where Ahmad Maarop FCJ (as he then was) speaking for the court said:

> [34] In explaining the meaning of possession, in the off-cited case of *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237; [1956] 1 LNS 17 (cited with approval by this court in *Public Prosecutor v Abdul Rahman Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 and in *Public Prosecutor v Denish Madhavan* Thomson J said:
>
> > 'Possession' itself as regards the criminal law is described as follows in Stephen's Digest (9th Edition, page 304):
> >
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, *there is a physical element and a mental element which must both be present before possession is made out.* The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. *It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case*. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so.
>
> [35] So, in our judgment in the circumstances of this case, the presence of the ladies clothing (two female upper garments and two pairs of female jeans) along with male clothing in the third room of the first house does not mean that no possession was established against Siew. The crucial question is whether Siew was so situated with

respect to the proscribed drugs found in the second and third rooms of the first house that he had the power to deal with the drugs as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need. In other words, Siew must be so situated that he can deal with the proscribed drugs as if it belonged to him, and it must be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so (he had *animus possidendi*). Invariably this is a fact which can only be proved by inference from surrounding circumstances of this case. It must be clear from the circumstances in which the proscribed drugs were found, that Siew had the intention of dealing with the drugs as if they belonged to him. The list of such possible circumstances is not exhaustive. One example of such circumstances given by Thompson J in *Chan Pean Leon* is a case where an article is found in a locked room where one holds the key.

[49] This pronouncement in *Siew Yoke Keong* was reaffirmed by the Federal Court in *Ghasem Hozouri Hassan v Public Prosecutor* [2019] 6 MLJ 231; [2018] 6 CLJ 133, where Md Raus Sharif CJ speaking for the court held:

> [30] In *Siew Yoke Keong*, this court held that the presence of the ladies clothing (two female upper garments and two pairs of female jeans) along with male clothing in the third room of the first house did not mean that no possession was established against the accused. The crucial question was whether accused was so situated with respect to the proscribed drugs found in the second and third rooms of the first house that he had the power to deal with the drugs as owner to the exclusion of all other persons, and when the circumstances were such that he may be presumed to intend to do so in case of need.
>
> [31] Thus, from the above, when we talk about the issue of custody and control, what is crucial is that the accused must be so situated that he can deal with the proscribed drugs as if it belonged to him, and it must be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so (he had *animus possidendi*). The intention to deal with the drugs here refer to the element of knowledge.
>
> [32] We must not lose sight of the fact that more often than not the accused claims ignorance of the drugs to rebut/negate the element of knowledge. Thus, in the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

[50] As for the mens rea element of possession, in *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 Arifin Zakaria FCJ (as he then was) having referred to cases from the apex courts of Singapore and England held as follows:

> [18] In *Ramis a/l Muniandy v Public Prosecutor* [2001] 3 SLR 534, the Singapore Court Appeal again propounded on the question of knowledge necessary to establish possession and at p 541 states:

Knowledge of drugs

The starting point in the consideration of this issue was that we had already concluded that the drugs were already on Ramis's motorcycles when he entered the vicinity and that he had physical control of the drugs. In the absence of any reasonable explanation by Ramis, these facts were sufficient to lead to a strong inference that Ramis knew that the bag found on his motorcycle contained drugs.

In *Tan Ah Tee*, Wee Chong Jin CJ, delivering the judgment of the court, said ([1978-1979] SLR 211 at 217–218; [1980] 1 MLJ 49 at p 52):

Even if there were no statutory presumptions available to the prosecution, once the prosecution had proved the fact of physical control or possession of the plastic bag and the circumstances in which this was acquired by and remained with the second appellant, the trial judges would be justified in finding that she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the physical fact which the trial judges accepted or which raised a doubt in their minds that she had possession of the contents within the meaning of the Act.

[19] The issue of knowledge necessary to establish possession came to be considered by the English House of Lords in the case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, which was considered and relied upon by the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor*. In *Warner* the following question was posed to their Lordships:

Whether for the purpose of section 1 of the Drugs (Prevention of Misuse) Act, 1964, a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature.

[20] At p 367 Lord Reid addressed the issue as follows:

The object of this legislation is to penalise possession of certain drugs. So if mens rea has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession. It would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is commonplace that, *if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty.* Further, *it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession.* Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So *it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession.* That would not lead to an unreasonable result.

[21] In the same case Lord Morris answered the question in following manner:

If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is

> some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[51] The mental element of knowledge of the thing possessed is rarely proved by direct evidence. Knowledge is usually inferred from the surrounding circumstances. This was reiterated by this court in *Simon Savarimuthu a/l Thevarajah v Public Prosecutor* [2020] 2 MLJ 495; [2020] 5 CLJ 105 in the following terms:

> On the facts before us, we were in as good a position as the trial judge to draw the inference whether the appellant had knowledge of the drugs. It is trite that proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It is sufficient for the prosecution to prove facts from which it can be properly inferred that an accused person had the necessary knowledge. The court is not concerned with the knowledge of a reasonable man but is concerned with reasonable inferences to be drawn from a concrete situation as disclosed in the evidence as it affects a particular person whose knowledge is in issue (see *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649; *Parlan Dadeh v Public Prosecutor*).

[52] In the present case, the prosecution did not rely on the statutory presumption in s 37(d) of the Act. They contended that the evidence was sufficient to show that the appellant was in actual possession of the drugs that were found, both in the white plastic bag that the police seized from his hand, and the two plastic packages in the bedroom upstairs containing two gunny sacks filled with the slabs of cannabis. The learned trial judge analysed this evidence in paras 31–53 of the grounds of judgment.

[53] In respect of the drugs which are the subject matter of the first amended charge, the evidence of SP8 shows that the appellant was seen coming out of the front door of the house carrying the white plastic bag (P38) in his left hand. The white plastic bag had the words 'KIO-DA' written on it. The defence had a different version, which was put to SP8. The defence asserted that the white plastic bag was actually found on the roof of the Viva car parked in the house porch, and that the accused was not holding the white plastic bag in his hand

when apprehended. However, SP8 credibly denied this and stood firm with his evidence that the appellant was holding the white plastic bag at the material time.

[54] SP8 examined the contents of the said white plastic bag and found one slab of dried compressed plant material wrapped with transparent plastic, which was subsequently analysed and confirmed as cannabis.

[55] There was no evidence of any prior relationship or any evidence that the appellant knew any members of the police raiding team or vice versa. Thus, the learned trial judge concluded that there was nothing to suggest that the police might have had any motive to frame the appellant. In the absence of any such motive, or evidence, the learned trial judge found that despite the assertion by the defence that the white plastic bag with the drugs was found on the roof of the Viva car outside the house, the evidence established the fact that the appellant was holding the white plastic bag in his hand when apprehended. It must be noted that at the prosecution stage, the suggestion made to SP8 that the appellant was not holding the white plastic bag (P38) and that P38 was found on the roof of the Viva car, without anything more does not become evidence at that stage, it remains a mere suggestion. See this court's pronouncement in *Mirza Murtala v Public Prosecutor* [2010] 5 MLJ 616; [2010] 4 CLJ 150.

[56] The learned trial judge further found the appellant's reaction of being shocked ('terkejut') at the time of arrest was relevant as evidence of conduct that can be used to infer knowledge under s 8 of the Evidence Act 1950. See: *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717.

[57] However, we accept the contention of the learned counsel for the appellant that the appearance of being shocked at the time of arrest is by itself not necessarily the strongest strand of evidence against the appellant to infer knowledge, as was noted by this court in *Simon Savarimuthu a/l Thevarajah v Public Prosecutor* [2020] 2 MLJ 495; [2020] 5 CLJ 105 as follows:

> Several inferences could be made from the facts, one of which was that he looked shocked and in trying to run away reflected a guilty mind. It could also be inferred that he was trying to flee from a group of strangers who approached him. We were of the view that the appellant looked shocked and tried to flee did not necessarily lead to the irresistible inference that he had knowledge of the drugs. We find support in our finding from the observation of the Federal Court in *Public Prosecutor v Tan Tatt Eek* [2005] 2 MLJ 685; [2005] 4 CLJ 460 as follows:
>
> > To my mind the reaction of shock and the dropping of the bag exhibited by a person caught by surprise does not unequivocally show guilt. It could easily be the reaction of an innocent but surprised person. No firm inference can be drawn on the basis of such insufficient evident.

[58] Nevertheless, we find the evidence of the appellant actually holding the white plastic bag (P38) containing the slab of cannabis, and walking towards the house gate to get to his motorcycle parked outside, is indicative of knowledge of the drugs in the bag. More so when 71 more similar slabs of cannabis were later found in the bedroom upstairs together with his belongings. These evidence, when taken together with the appellant's reaction of being shocked upon arrest, leads to the irresistible inference that in the circumstances the appellant knew about the incriminating items found inside the white plastic bag (P38) and later in the bedroom.

[59] Learned trial judge further found that the circumstances showed that the appellant was so situated with respect to the impugned drugs that he had the power to deal with it as owner to the exclusion of all other persons. See: *Chan Pean Leon v Public Prosecutor*. In the final analysis, the facts and circumstances of the case gives rise to an irresistible inference that the appellant had knowledge of the drugs in the bag. See: *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 (FC).

[60] Given the above, the learned trial judge found that the appellant was in actual, as opposed to presumed, possession of the drugs contained in the white plastic bag seized from the hand of the appellant which constitutes the subject matter of the first amended charge. We find that the finding of the learned trial judge at the close of the prosecution to be well supported by evidence, and the inference drawn is wholly in accord with the facts and circumstances of the case.

[61] Regarding the possession of the drugs found in the bedroom on the first floor of the house, there is the evidence of SP5, the appellant's wife. SP5 testified that the house was rented from a person known as Rosli. She said that her relationship with the appellant was strained, and that the bedroom at the upper floor where the drugs were found was occupied by the appellant. She further said that she had never entered that bedroom upstairs.

[62] The learned trial judge noted that besides the large quantity of cannabis found in the said bedroom, there were also personal belongings of the appellant found in that room, including his passport, insurance document, electricity bill, and clothes in the cupboard. Interestingly there was also an electronic scale and tools for weighing and packaging found next to the black packages containing the drugs.

[63] The defence suggested to the prosecution witnesses that a person by the name of Abang Man and his wife were occupying the bedroom at the material time. It was further suggested that this couple had left the house a day before the police raid. These suggestions were not agreed to by the prosecution

witnesses. The prosecution witnesses said that they had no knowledge as to whether the defence assertion was true or otherwise.

[64] The appellant's wife testified that she would not stay in the house when the appellant's visitors were in the house, and that there were visitors to the house from time to time. However, she did not see Abang Man or his wife in the house. She also said the bedroom is never locked, and that the house key is kept in a shoe or under the air conditioning unit.

[65] Given the fact that SP5 never entered the bedroom upstairs, and the fact that she stays away from the house when appellant's visitors came to the house, she was not in the best position to say who else, apart from the appellant, had stayed in the house or the bedroom upstairs. In any event, there was no evidence to show that the bedroom was occupied by anyone other than the appellant at the material time of the raid. The learned trial judge took all this into consideration.

[66] The learned trial judge also concluded that even if visitors had occupied the bedroom, there were other factors to consider. Firstly, it is not reasonable to suppose that the appellant himself had failed to notice the couple, Abang Long and his wife, or any one of them, carrying two huge plastic packages to the upstairs bedroom and leave them behind. Secondly, the large quantity of drugs must have considerable value attached to them. If these large quantities of drugs belong to the visitors, as suggested by the defence, it is unlikely that they would have left behind such quantities of drugs of considerable value when they left the house. Further, even if they had left these two large packages of drugs, it is unlikely that the appellant who occupied that bedroom would not have noticed these two large packages and the electronic weighing scale, and plastic wrap in the room. Hence, the learned trial judge concluded that:

> [52] Under all the circumstances, I find that the accused had the requisite knowledge of the impugned drugs in the said bedroom and that he was so situated with respect to the impugned drugs that he had the power to deal with it as owner to the exclusion of all other persons. See *Chan Pean Leon v Public Prosecutor*.
>
> [53] I therefore find that the accused was in actual as opposed to presumed possession of the drugs found in the upstairs bedroom and which constitutes the subject matter of the second charge.

[67] We do not find any misdirection by the learned trial judge when he came to the conclusion that the element of possession, both physical and mental, had been established by the prosecution. This is a finding of fact by the learned trial judge. The law is well settled that the appellate court would be slow to disturb findings of facts unless the trial court had clearly and wrongly evaluated the evidence, or the finding is plainly wrong, or unsupported by

evidence. See *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236 (FC). We do not find any such deficiency here.

Third ingredient — Trafficking

[68] Just like possession, the element of trafficking can be established by the prosecution either by direct evidence of trafficking as defined in s 2 of the Act or by relying on the statutory presumption in s 37(da) of the Act. The prosecution relied on the statutory presumption in s 37(da)(vi) of the Act to prove the element of trafficking. Section 37(da)(vi) of the Act reads:

> (da) any person who is found in possession of —
>
> (vi) 200 grammes or more in weight of cannabis, otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

[69] As the appellant was found to be in possession of cannabis weighing 1,003g as per the first amended charge, and 71,398g as per the second amended charge, the learned trial judge found the element of trafficking had been established by invoking the statutory presumption of trafficking in s 37(da)(vi) of the Act since the weight of cannabis in the appellant's possession in both amended charges were above the statutory minimum of 200g, and there was no evidence to show that the appellant's possession of the drugs was pursuant to lawful authority accorded under the Act or any other written law.

Issue of corroboration and sufficiency of evidence

[70] At the close of the prosecution case, the defence submitted that there was no corroboration of the events that took place leading to the arrest of the appellant as only SP8 testified to this fact, and that none of the other police officers in the raiding team were called as witnesses by the prosecution.

[71] The learned trial judge held that nothing by way of practice or law required the raiding and arresting officer's evidence to be corroborated in a case such as this. In any event, the law does not prescribe any particular number of witnesses to prove any fact. This is provided in s 134 of the Evidence Act 1950, that reads:

> 134 Number of witnesses
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> No particular number of witnesses shall in any case be required for the proof of any fact.

[72] The Federal Court in *Md Zainudin bin Raujan v Public Prosecutor* [2013] 3 MLJ 773; [2013] 4 CLJ 21 affirmed a drug trafficking

conviction based on the sole testimony of a police witness. The evidence to prove a fact is not judged from the total number of witnesses, but rather from the strength and quality of the evidence: whether it is probable, consistent, credible and convincing for the evidence to have probative value. It is well settled that evidence must be weighed and not counted. See: *Izwanuddin bin Kasim v Pendakwa Raya* [2020] MLJU 1807; [2020] 1 LNS 1568 (CA); *Mogan Raj a/l Ravi & Anor v Public Prosecutor and another appeal* [2020] MLJU 48; [2020] 3 CLJ 240 (CA).

[73] Where the law does not require corroboration of a witness' evidence, the prosecution is not obliged to tender such corroborative evidence. The testimony of a single witness, if credible, is sufficient to establish any fact. The learned trial judge had expressly stated that SP8 was a credible witness, and accepted his evidence. He had also considered the arguments advanced by learned counsel for the appellant on the inconsistencies and discrepancies of evidence between SP8 and two other prosecution witnesses in coming to the conclusion that SP8 is a credible witness.

[74] It is not the function of an appellate court to make primary findings of facts. See: *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203; [2006] 1 CLJ 457 (FC). The credibility of a witness is primarily for the trial judge to decide, and the appellate court should always be slow in disturbing such findings by the trial judge who has had the benefit of audio-visual perception of the witness' demeanour. See: *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236 (FC); *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293 (FC); *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644; [2000] 3 CLJ 289; *Amri bin Ibrahim & Anor v Public Prosecutor and another appeal* [2017] 1 MLJ 1; [2017] 1 CLJ 617.

[75] However, there are exceptions to the general rule, and there can be instances where such appellate intervention is warranted. In *Mahinder Singh v Public Prosecutor* [1967] 1 MLJ 126; [1966] 1 LNS 95, and in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405; [2004] 3 CLJ 737, the Federal Court did not accept the finding of the trial judge that a witness was a witness of truth, and thus there was appellate intervention in that regard.

[76] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* Abdul Hamid Mohamad FCJ clarified the principle of appellate intervention on findings of fact as such:

> Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that that is his finding of facts. It

should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh's case* [1964] 2 MLJ 209 'there are substantial and compelling reasons for disagreeing with the finding.' Otherwise, no judgment would ever be reversed on question of fact and the provision of s 87 of the CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.

[77] However, in the present appeal, we do not find any substantial or compelling reason to disagree with the trial judge's finding that SP8 was a credible witness and that the testimony of SP8 was clear and convincing. There was no evidence to impute any motive on SP8 to lie in court and implicate the appellant. The absence of the other police officers of the raiding party did not create any gap in the prosecution's case. In the circumstance, no adverse inference should be drawn against the prosecution as there was no suppression or withholding of evidence.

[78] The defence also raised the issue regarding the discrepancy as to the time the raiding party arrived at the vicinity of the house. The defence submitted that there was discrepancy between SP8's oral testimony and the police report that was lodged. The learned trial judge did not consider the discrepancy to be material and substantial in nature so as to affect the veracity of SP8's evidence, and the prosecution case as a whole. In paras 58–62 of the grounds of judgment, the learned trial judge had stated:

Discrepancy as to time

[58] Defence counsel submitted that there was a discrepancy as to the time the raiding party arrived at the scene of the incident. This related to the testimony of SP8 which it was submitted contradicted himself in this respect.

[60] I do not find however from a perusal of the evidence of SP8 that the time difference as to when the raiding party arrived at the scene of the incident to be such as to throw doubt on the veracity of SP8's testimony.

[61] The discrepancy was not substantial in nature so as to affect the prosecution case against the accused.

Contradiction as to how many females were in the hall

[62] This again, even if true, does not detract from the veracity of the testimony of SP8 so as to prejudice the prosecution case.

[79] Discrepancies in testimony are a common feature in trials. There is no rule that required the entire evidence of a witness to be disregarded merely because the witness may have contradicted himself in one or two points, or that his evidence is contradictory to that of another witness. The trial judge would have to determine if the discrepancy is material or minor. Ultimately, it is for

the trial judge to determine which part of the witness' evidence he is to accept and which to reject. This exercise was carried out by the learned trial judge, and he found the discrepancies to be minor, which does not affect the credibility of SP8.

[80] Having gone through the evidence thoroughly ourselves, we have come to the same conclusion as the learned trial judge that the discrepancies do not materially affect the prosecution case nor SP8's credibility as a witness. It would be quite improper for this court to rule that SP8 is not a reliable witness, purely on the basis that his evidence contained a number of contradictions without us having the advantage of seeing his demeanour while giving evidence. Thus, we found no compelling reasons that require our appellate interference, as was urged upon us by learned counsel for the appellant.

Ruling at the end of the prosecution case

[81] We have noted that the learned trial judge conducted a maximum evaluation of the evidence as required under the law, particularly s 180(1) of the CPC, and in accordance with the principles set out in high case authorities on the subject. Following that assessment, the learned trial judge found that the prosecution had successfully established a prima facie case for both amended charges. The appellant was called to enter his defence. The appellant elected to give sworn testimony. The onus was now on the appellant to rebut the statutory presumption of trafficking on a balance of probabilities. See: *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; [1968] 1 LNS 116 as applied in *Ng Chai Kem lwn Pendakwa Raya* [1994] 2 MLJ 210; [1994] 2 CLJ 593.

The defence case

[82] The appellant testified that he was not carrying the white plastic bag (P38) in which the drugs were found. The appellant said that the white plastic bag (P38) was found on the roof of the Viva car parked in the porch.

He further added that when he come home earlier that evening, he had seen the plastic bag on top of the Viva car. The appellant said that when he was arrested by the police, he was exiting the house towards his motorcycle that was parked outside. He said that he wanted to go see a friend to discuss about a carwash business.

[83] The appellant said that his sister Kartika Mazlina and brother-in-law Rizal bin Muhammad (DW2) lived in the house across the street. The appellant testified that before the police arrived, DW2 was seated in front of his house smoking a cigarette and had observed what the police did during the raid.

[84] The appellant said that he was shocked when the police found drugs in the white plastic bag and inside the two large black plastic packages in bedroom upstairs. He denied the drugs were his. He added that two days before the police raid a person by the name of Azman or Abang Man and his wife Kak Yati came to stay in his house. He described Abang Man as like an adopted brother. The appellant further said that the house was rented in the name of his wife, and besides the master bedroom, there was another room occupied by his elder daughter. He said that the master bedroom was only used for storing family things. The appellant said that he had no knowledge of the two large plastic bags found in the master bedroom and that he suspected they belong to Abang Man.

[85] The appellant said that he had informed the investigating officer that Abang Man had come and stayed in his house prior to the raid but the investigating officer did not pay any heed. The appellant said that he was framed up.

[86] DW2, the appellant's brother-in-law, testified that he lived in the house opposite to the appellant's, and on that night he was seated outside having a smoke. He said that he had clear vision of the appellant's house as there were street lights. He testified that he saw a black car passing DW2's house and stop. He saw four men alighting from the car. He said that just before that he saw the appellant wearing his shoes, but did not see the appellant carrying anything.

[87] DW2 further said that on the same day at about 5pm he saw two men and a lady exiting the house, but did not know who they were.

Finding at the close of defence case

[88] The learned trial judge reminded himself of his duty at the close of the defence case. He referred to s 182A of the CPC which imposed an obligation upon the trial court to consider all the evidence, both prosecution and defence, to decide whether the prosecution had proved its case beyond reasonable doubt. See: *Prasit Punyang v Public Prosecutor* [2014] 4 MLJ 282 (CA); *Md Zainudin bin Raujan v Public Prosecutor* [2013] 3 MLJ 773; [2013] 4 CLJ 21, (FC).

[89] The learned trial judge in paras 100–126 of the grounds of judgment analysed the evidence as a whole and concluded that the defence had failed to raise any reasonable doubt as to the fact of possession of the drugs, and had also failed to rebut the statutory presumption of trafficking on a balance of probabilities in respect of both amended charges. Accordingly, the appellant was convicted on both charges and sentenced to mandatory death.

[90] Learned counsel for the appellant complains that the defence of the appellant was not properly assessed and evaluated by the learned trial judge. We are unable to agree with that contention. We find that the learned judge had considered all aspects of the defence and weighed the evidence adduced by the defence in totality with the evidence of the prosecution. The version of events given by SD2 was given due consideration by the learned who did a minute and detailed analysis of his evidence. The analysis of the defence case is found from para 100 onwards of the grounds of judgment:

> G) ANALYSIS OF THE DEFENCE CASE
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> [100] The essence of the defence is that the white plastic package related to the first charge was not as alleged, seized from the hand of the accused while exiting the house but found instead on the roof of the Viva car parked in the house compound. The said car belongs to the wife of the accused.
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> [101] With regard to the subject matter comprising the second charge, the defence is that the two plastic packages were left behind by a person by the name of Abang Man who had come to stay with his wife in the accused's house. The accused suspects that the said Abang Man had left behind the two packages in order to frame the accused.
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> [102] In relation to the first charge, as I held at the conclusion of the case for the prosecution, during the course of evidence I did not find anything that suggested that any members of the raiding party knew the accused or vice versa so that would exclude any obvious motive on the part of the police raiding party to want to frame up the accused by giving evidence that the accused was carrying the white plastic package seized from his hand when he was in fact not doing so.
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> [103] DW2 however gave evidence that he did not see the accused carrying anything in his hand at the time of him exiting the house. Although DW2 is related to the accused as a brother-in-law there is nothing that states that an interested witness is unworthy of belief for that reason alone and therefore his evidence stood to be assessed like that of any other witness.
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> [104] One of the reasons DW2 attributed his ability to see the accused when the latter exited his house is that he had fixated his gaze at a motorcycle in the accused's house.
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> [105] DW2 would have surely been familiar with that motorcycle as he would probably have seen it many times. DW2 said that his wife was not agreeable with him smoking inside the house and so he smoked in the car porch instead. This indicated that this was obviously not an isolated occurrence. If DW2 was indeed smoking in the car porch that night there would have been no particular reason for him to fix his gaze at an object he was obviously so familiar with.
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> [106] It was while at the car porch that DW2 said that he witnessed the accused putting on his shoes and said that he did not see him carrying anything in his hand. DW2 also said that he saw a white plastic package on top of the Viva car.

A [107] Even assuming that DW2 was indeed fixing his gaze at the motorcycle, which I do not find to be reasonable given that this was a regular occurrence, there would have been no particular reason to then notice the white plastic bag on top of the Viva car.

B [108] Even though it was put to PW8 that the KIO DA plastic bag was found on top of the Viva car registration no. JNT 8250 and not held by the accused as alleged, he denied the suggestion.

C [109] Another relevant fact also considered at the close of the prosecution case but which merits repeating is the reaction of the accused when the KIO DA plastic bag was recovered from him which was said to be one of shock. This display of such conduct was relevant to show knowledge on the part of the accused that the contents contained dangerous drugs.

D [110] DW2 also said that he went to the police station that night in order to take the accused's children back with him. Yet he made no attempt to inform the police of his version of the events. Despite the fact that DW2 said that the police knew of his presence there and had taken a photograph of his identity card, he did not bother to venture an explanation in defence of the accused.

E [111] DW2 said that the police did not take a statement from him. I do not find the version of DW2 in this respect to be reasonable. If DW2 did indeed witness that that the accused was not carrying anything in his hand, DW2 would have ventured to lodge a report as to the true nature of events especially given the proximity of his relationship with the accused and the seriousness of the charges.

F [112] The reasonable inference from this notable omission was that DW2's version of events were untrue as was the testimony of the accused himself for the reasons earlier given. The defence also did not raise a reasonable doubt in the prosecution case for possession nor rebut the statutory presumption of trafficking on a balance of probabilities under section 37(da) DDA in respect of the first charge.

G **[91]** Hence, it is patent and obvious that the learned trial judge had given due consideration to the appellant's version in relation to the first amended charge, and in particular the evidence of DW2 had been assessed and considered at length. The outcome of that evaluation and findings made may not be in accord with the expectation of the appellant, but that does not mean that the defence contention had not been properly assessed by the learned trial H judge. We find that there is sufficient judicial appreciation of the evidence by the learned trial judge. We do not find any good reason to interfere with these findings of fact.

I **[92]** As for the second amended charge, once again the learned trial judge had done a detailed assessment of the evidence adduced by the defence and this is found in paras 113–126 of the grounds of judgment. After the lengthy and detailed consideration of the evidence, the learned trial judge concluded that Abang Man and his wife were an invention of the accused, and that no one except the appellant was occupying the bedroom in which the two large black

packages containing the drugs were found. The appellant's wife (SP5) had confirmed in re-examination that she did not see for herself anyone come and stay in the house. The wife also confirmed that she never went into that room. The appellant's personal belongings, including his passport and an Etika Insurance letter in the name of the appellant were found in the room. So were his clothes.

[93] The appellant also failed to furnish the police with the particulars of the said Abang Man, including his full name, address and telephone, in order for the police to carry out investigations and locate this Abang Man, if he existed. If indeed Abang Man had framed him, the appellant would have given all necessary details to the police in order to trace and apprehend this Abang Man. Alas, this was not done.

[94] There was also the lack of any discernible motive for this Abang Man to frame up the appellant, especially when the appellant regarded Abang Man as his adopted brother. The frame up theory advanced by the appellant vaporised into thin air when considering the fact that the large amount of drugs have considerable value. We agree with the learned trial judge that no reasonable person would want to frame up someone by leaving such a huge quantity of drugs with considerable value behind in the bedroom.

[95] Besides the enormous quantity of drugs, there were also an electronic scale, metal ruler, cutter and a roll of transparent plastic wrapper found in the bedroom. The presence of these implements were indicative of the fact that the drugs were meant to be weighed, measured and packed, with the obvious intention of trafficking.

CONCLUSION

[96] We did not find any reason to interfere with those findings, and we confirmed the findings of fact made by the learned trial judge leading to the conviction of the appellant on both amended charges. We concur with the learned trial judge that considering all the evidence, the prosecution had successfully proven their case in respect of both charges beyond a reasonable doubt. Hence, we find that the conviction on both amended charges are safe.

[97] As for the sentence, we find that considering the mandatory nature of the sentencing provision found in s 39B(2) of the Act, the only sentence to be meted out to the appellant was the mandatory death sentence, as the lesser sentence of life imprisonment provided under s 39B(2A) of the Act did not apply in the circumstances of the case. The reason being that the requirement in para (d) to that section, ie that the person convicted had assisted an

A enforcement agency in disrupting drug trafficking activities within or outside Malaysia, was not satisfied.

[98] Hence, the appeal was dismissed, and the order of the High Court affirmed.

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Appeal dismissed.

Reported by K Selvaraju

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